No. 14,922

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE DUSHON, HAROLD RATHGEB, HILTON DUKE, PETER J. VALLENTINE, NELS PILSKOG, JOE MISZENCIN and THOMAS J. GOLDEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court for the Territory of Alaska, Third Division.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

I. JURISDICTION.

In amplification of the appellants' jurisdictional statement, Title 28, Section 2671 (28 USCA 2671), 62 Stat. 982, as amended, defines certain terms used in Title 28, Section 1346(b). Although the Federal Defense Bases Act, Title 42 (Chapter 11, "Compensation for Disability or Death to Persons Employed at Military, Air and Naval Bases Outside the United States"), 1651-54, (42 USCA 1651-4), 55 Stat. 622-3,

as amended, which adopts the provisions of The Longshoremen's and Harbor Worker's Compensation Act, Title 33, Sections 901-950 (33 USCA 901-950) was applicable to the plaintiffs, they have the right to receive compensation or to recover damages against a third party liable for damages (in this instance alleged to be the United States of America as owner and operator, through its instrumentality, of the Alaska Railroad). The plaintiffs maintained their action by election under the provisions of Title 33, Section 933 (33 USCA 933) 44 Stat. 1440, as amended.

II. STATEMENT OF THE CASE.

A. Pleadings.

The restriction by the appellants of their specifications of error on which they rely, make it unnecessary to point out the additional defenses set up by the appellee in its pleadings.

B. The Facts.

Under terms of a contract entitled "Turnagain Arm Project, Section G", which contract was entered into under date of May 20, 1949 and admitted into evidence as defendant's Exhibit BB (STR. 17), the successful bidders, three heavy construction contractors, Morrison-Knudsen Co., Inc., a Delaware corporation, Peter Kiewit Sons Company, a Nebraska corporation, and S. Birch & Sons Construction Company, a Montana corporation, joined together in a joint venture which was known as Morrison-Kiewit-Birch

(hereinafter referred to simply as the Contractor) and undertook to rehabilitate a portion of the Alaska Railroad tracks south of Anchorage, between two stations known as Potter and Indian (TR. 432, 433, 443) (STR. 2, 15). The contracting corporations which formed the joint venture were experienced and competent independent contractors and were deemed by the defendant to be qualified for the job (STR. 18). The job site location necessitated that men, equipment and materials be moved over the Alaska Railroad tracks to the place of work. The right of access to the job was derived from said contract (Defendant's Exhibit BB) (TR. 96, 127, 131) but in order to obtain such access the contractor had to provide motor cars for utilization of the tracks of the Alaska Railroad. Some of these cars were purchased by the contractor and some were rented from Morrison-Knudsen Co., Inc. (TR. 436) who in turn had a previous rental agreement with the Alaska Railroad (Plaintiffs' Exhibit 1). This rental or leasing agreement for rail motor cars and push cars which was entered into under date of January 1, 1949 was between Morrison-Knudsen Co., Inc., alone (and not the contractor) and Alaska Railroad, the date of which was coincidental with prior rehabilitation work being performed by Morrison-Knudsen Co., Inc. (TR. 22). Said rental agreement (Plaintiffs' Exhibit 1) did not pertain to the Turnagain Arm Project, Section G (TR. 446, 449, 450, 452).

In permitting the contractor to operate upon its tracks, the Alaska Railroad never hired nor sent any

motor car operators anywhere for the contractor (TR. 129). However, the contractor's employees who were to operate rail motor cars were required by the Alaska Railroad to conform to certain of its operating procedures (TR. 23, 24, 97) and the Alaska Railroad retained the right to approve any motor car operator selected by the contractor (TR. 459, 463). In order to determine whether the contractor's employees whom the contractor had designated to operate rail motor cars were qualified so to do, the Alaska Railroad required such motor car operators to be examined, both written and oral, as to the operating rules of the railroad (TR. 19, 34, 35, 91). Upon such approval being given, a certificate of examination was delivered to that person. Such a certificate did not constitute a permit or license for that person to operate on the railroad's tracks but was merely a means of identifying that such person was qualified to operate a rail motor car (TR. 102, 103, 104, 126, 127, 128). In this instance Alaska Railroad certificate of examination No. 1036 was issued to Harold D. Greene, (TR. 18) (Plaintiffs' Exhibit 2) (TR. 19-21) after due examination (TR. 22) (Plaintiffs' Exhibits 4 and 5), (TR. 29, 34, 35, 37 and 130), he being the same person who subsequently was operating the rail motor car and man haul cars which collided with Alaska Railroad's "Passenger Extra 562 South", resulting in the plaintiffs' injuries.

Harold D. Greene had been employed in July, 1948 by Morrison-Knudsen Co., Inc., on another project near Fairbanks as an "expediter" (STR. 3, 8, 9).

He continued in the employ of that firm (except for winter layoffs) until he was employed in March 1950 by the contractor to operate rail motor cars on the Turnagain Arm Project (Defendant's Exhibit BB) (TR. 435, STR. 10, 11). Greene's salary was paid by the contractor (STR. 3, TR. 97). He was selected for the job by Gus Rathert, the project manager for the contractor (TR. 435, 448) and all of Greene's directions and orders to perform work were given by the contractor, principally through the project manager, Gus Rathert (TR. 435, 436, 437). There was no direct relationship between the Alaska Railroad and Greene (TR. 90). There were no orders or other restrictions given to or placed upon Greene by the Alaska Railroad in the use of the portion of track (12.2 miles) between Potter and Indian except that he had been examined and approved as a motor car operator and was supposed to obey the rules and keep out of the way of the trains of the Alaska Railroad (TR. 436, 437) (TR. 18, 23, 24, 25, 57). The various rules and regulations adopted by the Alaska Railroad were in force for the purpose of the safety and protection of the railroad's property and passengers (TR. 76). In the event of an infraction of those rules, Greene was not subject to be penalized by the Alaska Railroad, as he did not work for the railroad, but was only subject to disqualification as a rail motor car operator (TR. 88, 89, 90, 100). Part of the railroad's operating procedure was to issue (TR. 93) and transmit (TR. 283, 287, 300, 301, 314) twice a day to its personnel involved information of contemplated movements taking place upon its tracks, which infor-

mation was called a "lineup". As a rail motor car operator, Greene, in order to conform to the railroad's rules and regulations had to obtain such a lineup (TR. 126). The movements of Greene's motor car also appeared on the "lineup" (TR. 98), but a "lineup" was for information only and conveyed no authority from the railroad to operate (TR. 92, 98). Safety precautions of the railroad required that in rounding a curve (such as the one on which the collision occurred) where the view was obstructed, a flagman must be sent out to protect the motor car from any approaching train, (TR. 92, 93, 94, 323) and it was the responsibility of the rail motor car operator to see that the track was clear (TR. 233, 291, 484).

Rainbow was the contractor's campsite and was located on the work area, south of Potter and approximately 4.8 miles north of Indian. On March 24, 1950, Greene was under orders of the contractor (TR. 437, 440, 465) to proceed south from Rainbow to Indian and pick up a work crew at the end of the day's shift at approximately 5 o'clock P.M. and return them to camp. Greene had received the line-ups for the day (STR. 23, 24, 26). After train No. 4, which was going north, left Rainbow about 3:45 o'clock, P.M., (STR. 28) Greene started south toward Indian with his rail motor car pulling four empty man haul cars behind (STR. 27, 29). In the course of returning from Indian and after picking up members of the contractor's crew, including the plaintiffs, Greene's rail motor and man haul cars, while traveling in a northerly direction on a blind curve at mile 91.7 (TR. 408) collided

with "Alaska Railroad Passenger Extra 562 South" traveling toward Indian. The collision tragically resulted in injury to the plaintiffs and others of the contractor's crew and gave rise to this lawsuit.

III. QUESTIONS INVOLVED.

Appellee contends that the District Court for the Territory of Alaska, Third Division, correctly found that Harold D. Greene was, at the time of the collision involved in this case, an employee of an independent contractor and not of the appellee, that Greene, not being thus an employee of the appellee, the appellants had failed to establish that an employee or agent of the Alaska Railroad was negligent, that the conclusion of law whereby the sole approximate cause of the injuries of the appellants was other than the negligence of the appellee, and that said Harold D. Greene was employed by a government contractor within the meaning of Title 28, Section 2671 and therefore not an "employee of the government" within the meaning of the Act.

IV. SUMMARY OF ARGUMENT.

Appellants concede that under the Federal Tort Claims Act, liability can be predicated only upon the negligent act or wrongful omission of an "employee" of the United States (Appellants' Brief page 13). Nevertheless, appellants attempt to reach this conclusion by some undemonstrable alchemy based on non-

delegable duty under a railroad franchise, or on a lease or other relationship or possibly on the theory of dangerous instrumentality. Further while admitting that Harold D. Greene was employee of the contractor, appellants contend he was somehow the "special" employee of the defendant through "control" of Greene while he was operating on the tracks of the Alaska Railroad.

Appellee asserts that there is no non-delegable duty involved in that the Enabling Act of the Alaska Railroad (48 USCA 301-308; 49-3-1 ACLA 1949) authorizes the performance of acts necessary to facilitate carrying out the intent and purpose of the Congressional Enactment with the only charter obligations being to specifically operate the Alaska Railroad as a common carrier of freight and passengers. There is no lease or other delegation of charter or franchise powers involved. There is no authority for the proposition that the operation of the railroad is a "dangerous instrumentality" and further the United States has not consented to be sued on such a theory of imputed negligence.

Harold D. Greene was selected, hired and paid by the contractor. All of his duties were given and ordered by the contractor to be performed. The Alaska Railroad had no authority or control over Harold D. Greene. Although he was examined and approved by the Alaska Railroad Examiner as to his qualifications to operate a rail motor car, and while on the tracks of the Alaska Railroad he was required to conform to the railroad operating rules and proce-

dures, these however, carried no authority for Greene to operate any particular time nor directed him to go to any particular place but instead were promulgated for the protection and safety of the Alaska Railroad operations and property. Greene was not in any sense an employee of the appellee but instead was an employee of an independent contractor who was a "government contractor" within the meaning of Title 28, Section 2671 (28 USCA 2671) (62 Stat. 982, as amended).

V. ARGUMENT.

A. DEFENDANT IS NOT LIABLE FOR TORTS OF INDEPENDENT CONTRACTOR.

The appellants correctly state that generally a contractee is not liable for the torts of an independent contractor. However the appellants go on to assert that there are exceptions to the doctrine which insulates the contractee from the negligence of the independent contractor. The appellee asserts that these exceptions pertain to private corporations and concern remedial rights in respect of injuries caused by breaches of positive duties correlative to corporate franchises (see annotation in 28 ALR 122).

(1) Charter obligations.

Traditionally railroads have derived their powers from sovereign governments, and in the case of the Alaska Railroad, the Enabling Act (48 USCA 301-308; 38 Stat. 305; 49-3-1 ACLA 1949) specifically empowers the President of the United States "to do

all necessary acts and things in addition to those specifically authorized in said sections to enable him to accomplish the purpose and objects of said sections" (Sec. 307, Title 48; 38 Stat. 305). The purpose and objects referred to are obviously to operate the Alaska Railroad as a common carrier of freight and passengers (See Sec. 301, Title 48; 38 Stat. 305). This is the only *charter obligation* of the Alaska Railroad. A railroad *is not* liable for the torts of an independent contractor unless the enabling statute imposes on it the mandatory obligation of building the roads and performing related work, either expressly or by implication. The railroad may otherwise contract for such work and the contract is not a delegation of charter obligation. *Cunningham v. International Rail Co.* (1879) 51 Tex. 503, 32 Am. Rep. 632; *Sanford v. Pawtucket St. Rail Co.* (1896), 19 RI 537, 35 Atl. 67. Further the law is that a railroad is not liable for the acts of an independent contractor when the latter is not exercising any special franchise or charter power but is doing some act which could be done independently of the charter. *Atlanta & F. R. Company v. Kimberly,* 87 Ga. 161, 13 S. E. 227; *Boyd v. Chicago & N. R. Company,* 217 Ill. 332, 75 N. E. 496. Relief has been denied when the injury to the servant occurred while he was being carried on a train furnished by the railroad but operated by the independent contractor. *Scarborough v. Alabama Midland Co.* (1891), 94 Ala. 497, 10 So. 316. Further in this connection, the following is taken from *Hanna v. Chattanooga & Nashville R. Co.,* 88 Tenn. 310, 12 S. W. 718, at page 728 of the case as it is reported in 6 LRA 727:

"The plaintiff in his assignment of error insists that it was the duty of the Railroad Company to move its cars from one station to another, and that it could not devolve this duty upon another, so as to escape liability. This is a very correct rule, so far as applicable to a stranger who might have been injured by the cars, or to a passenger, on other cars, injured by the negligence of the persons thus permitted to take charge of the cars of the defendant Company, upon the principle, well established, that the Company owes a duty to the public, by reason of its franchises, from which it cannot absolve itself by turning over its road, or the management of its trains thereon, to others, whether corporations or individuals, without legislative sanction and exemption. But this rule does not apply in favor of the parties themselves who receive from the Company their cars with the understanding and agreement that they are personally to move or operate them for themselves or for their employer. In such case, the Company assumes no duty and no contract relation towards the parties so put in possession of the cars, except the duty to furnish sound and safe cars."

The cases to which the appellants refer in this category involve *private* railroad companies who have applied for and secured a charter from a state thereby undertaking and assuming certain duties and obligations by virtue of such charter. These cases hold that by asking for and receiving the franchise, the railroad corporation comes under obligation to answer in damages to anyone who may be injured by any negligence in the use of the privileges it has so received.

The individual states have many statutes and regulations spelling out the non-delegable duties of charter railroads. There are a number of reasons why this interesting body of law has no application whatever to the instant case: 1) The Alaska Railroad is not a privately owned chartered railroad but is rather an instrumentality and arm of the executive branch United States Government; 2) There are no statutes or regulations defining the powers or obligations of the Alaska Railroad, except for the Act of Congress under which the Alaska Railroad was purchased, which Act gave to the President complete discretion to operate the same; 3) There is, as a matter of law, no discoverable limitations upon the power of the Federal Government to contract for the performance of its proprietary functions by an independent contractor. None of the authorities suggested by the appellants hold that the Government does not have the power to entrust any given proprietary function to an independent contractor; 4) The Enabling Act, 48 USCA 301-308 does not impose a mandatory exclusive obligation upon the Alaska Railroad to personally construct the railroad and to perform other functions unrelated to the franchise obligation of carrying passengers and freight as a common carrier; 5) There is no showing that the function of carrying out the "rehabilitation program for the Alaska Railroad" is a delegation of Alaska Railroad's franchise or charter obligation.

In connection with the delegation of duties under a charter or franchise, the appellants have cited several

cases which fall under the category under discussion, to-wit, *Liberty Highway Company v. Callahan,* 157 N. E. 708, and *International-Great Northern Railway Company v. Lucas,* 70 S. W. (2d) 226. The *Liberty* case involved the delegation of a highway freight carrier's duties to a third person who inflicted the injury on the plaintiff's intestate. The case is not in point and can be distinguished from the instant case for the reason that Harold D. Greene was not performing duties for the Alaska Railroad. The *International-Great Northern Railway Company* case is not in point because (1) the plaintiff was himself one of the contractors, and not an employee; (2) the track car upon which the plaintiff was riding was admittedly operated by a railroad employee; (3) the defendant railroad agreed to furnish transportation for the contractor as a part of the consideration for the contract in question.

(2) No lease arrangement involved.

Appellants have made several references in their brief to the responsibility of a railroad for the torts of its lessee (Appellants' Brief pages 14 and 15). The record is wholly silent regarding any lease agreement or arrangement between the contractor and the Alaska Railroad pertaining to the contractor operating upon the railroad's tracks. The appellants' reliance upon authorities involving a lease is therefore faulty. No general statement can be made regarding liability under such a situation for the reason that any one of many factors may control, e.g., lease with authority, lease without authority, lease, franchise or otherwise.

One accepted treatise points out that a lease of a railroad *means transfer of control,* distinguished from a contract for the use of tracks where the railroad *retains* control and can fulfill its franchise duty. *Elliott on Railroads,* 3d Ed., Secs. 411-414, 514. Appellants have relied upon the case of *Chicago, Burlington & Quincy Railroad v. Willard,* 220 U. S. 413. However, this case can be easily distinguished and is not employed because (1) the lessor had leased its entire railroad for a period of 99 years, (2) the case was decided under a specific Illinois statute for which there is no counter-part applicable to Alaska Railroad, (3) the person killed was apparently a member of the public and not an employee of either company. Further the Appellants have relied upon another case, *Midland Valley R. Co. v. Toomer,* 162 Pac. 1127-30, which is distinguishable for the reason that the motor car in question was being operated as a train, that the plaintiff was an ordinary passenger for hire and not an employee of any contractor, that the services of the motor car were available to and were used by the public at large, and further that the defendant was a privately owned and chartered railroad company.

In the instant case the Alaska Railroad never entered into a lease of its tracks with the contractor, never surrendered control of any phase of operation pertaining to the movements of its trains (e.g., Enabling Act or charter obligations) nor did the Alaska Railroad create the impression expressly or impliedly that the contractor could exercise control of any part or portion of the "franchise obligation" of Alaska

Railroad to carry passengers and freight. On their face, the cases cited by the Appellants involving a lease situation are irrelevant and immaterial.

(3) The relationship of licensee.

The Appellants have erroneously emphasized a motor car rental agreement (Plaintiffs' Exhibit No. 1) between Alaska Railroad and Morrison-Knudsen Co., Inc. (and not the contractor) which was entered into at an earlier date for a different purpose (TR. 441, 449, 450, 452). Regardless, the contractor had the right to use the Alaska Railroad tracks between Potter and Indian (TR. 96, 127, 131) in the course of its performance of the contract (Defendant's Exhibit BB). Therefore, considering the contractor as a licensee, the law does not furnish the assistance which the Appellants desire. It is held that the licensor is not responsible for the injuries resulting from the negligent operation of trains by the servants of the licensee *Central of Georgia Rail Co. v. Bessinger* (1916), 17 Ga. App. 617, 87 S. E. 920. Similarly, the licensor is not liable for the negligence of the employees of the licensee, 74 Corpus Juris Secundum 895, Sec. 364, b. The same result has been reached in the case where the liability of the lessor was denied for the reason that the Railroad Company cars were received with the understanding that they were to be personally moved and operated by the persons involved or their employer. *Hanna v. Chattanooga & N. R. Co.,* supra (88 Tenn. 318, 12 S. W. 718). In the instant case the transportation involved was that of the contractor's crews

in the performance of the contract, for which the contractor was being paid by the Alaska Railroad. Harold D. Greene was therefore engaged in the business of the contractor and not that of Alaska Railroad.

(4) Dangerous instrumentality.

Appellants have included in the case upon which they rely certain ones that involve the theory of "dangerous instrumentality". Such are the cases of *American Pacific Whaling v. Kristensen,* 93 Fed. (2d) 17; and *Doll & Sons v. Rebetti,* (3 CCA) 203 Fed. 593. This is a form of "imputed" negligence and illegal fiction converting an independent contractor relationship into a principal-agent relationship, in order to accomplish its purpose. It is submitted, however, that the defendant is not liable under the Federal Court Claims Act on "imputed" negligence. The case of *United States v. Hull,* 195 Fed. (2d) 64, is in point and the following is taken from page 67 thereof:

> "Thus, in certain cases, under local law a private person may be liable without fault for injuries resulting from properly conducted activities deemed 'ultrahazardous'. Restatement of Torts Sec. 519. But the United States would not be subject to suit on such a liability, for under 28 U.S.C. Sec. 1346 (b), the United States has consented to be sued only where the injury was 'caused by the negligent or wrongful act or omission' of some employee of the government while acting in the scope of his office or employment."

The foregoing was cited with approval in the case of *Dalehite v. United States,* 346 U. S. 15, 73 S. Ct. 956,

97 L. Ed. 1427, where on pages 44 and 45 of 346 U. S., the following is stated:

> "Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that* doctrine. But the statute requires a negligent act. So it is our judgment that liability does not arise by virtue either of United States ownership of an 'inherently dangerous commodity' or property, or of engaging in an 'extrahazardous' activity. *United States v. Hull* (CA 1st Mass.) 195 F 2d 64, 67."

Attention is called to the case of *Humble Oil & Refining Co. v. Bell, et al.* (Tex. Civ. App.), 180 SW (2d) 970, where, on page 975, the Court stated that an employee of an independent contractor does not come within the class of third persons included in the rule which is to the effect that the employer may be held liable to a third person for negligence of the independent contractor in the performance of inherently dangerous work. Further, on page 976 of 180 SW (2d) the Court cited authorities for the proposition and stated that an employer owes no duty to exercise ordinary care to protect the servant of the contractor from the risks arising from the negligence of the contractor. The same rule is cited with approval in the subsequent case of *Texas Electric Service Co. v. Holt,* 249 SW (2d) 662.

In the instant situation the answer to the "inherent or intrinsic dangerous instrumentality" cases is found

in the facts themselves. It is obvious that the simplest precaution taken by Greene, e.g., flagging around the curve on which the collision occurred, would have prevented the collision.

B. HAROLD D. GREENE WAS NOT THE APPELLEE'S EMPLOYEE.

The Appellants have asserted that Harold D. Greene, while on the tracks of the Alaska Railroad, was the Appellee's employee by reason of the "control" exerted by Alaska Railroad. Factually, this position cannot be sustained by the Appellants.

Greene was employed by the contractor (TR. 435, STR. 10, 11) who paid his salary (STR. 3). He was selected for the rail motor car operator's job by the contractor's project manager (TR. 435, 448). All of Greene's work orders, directions and instructions to proceed with his rail motor car were given by the contractor, principally by delegation through the project manager (TR. 435, 436, 437). The Alaska Railroad never hired nor sent any motor car operators anywhere for the contractor (TR. 129). The rail motor cars and man haul cars involved were furnished by the contractor (TR. 436). There were no orders or other restrictions placed upon Greene by the Alaska Railroad in the use of the track between Potter and Indian except that he had been examined and approved as a motor car operator and was supposed to obey the rules and keep out of the way of the trains of the Alaska Railroad (TR. 436, 437) (TR.

18, 23, 24, 25, 57). The various rules and regulations adopted by the Alaska Railroad were in force for the purpose of the safety and protection of the Railroad's property and passengers (TR. 76). In the event of an infraction of these rules, Greene was not subject to be penalized by the Alaska Railroad as he did not work for the Railroad, but was only subject to disqualification as a rail motor car operator (TR. 88, 89, 90, 100). The "lineups" which carried Greene's name and operating area were not train or movement orders but were merely for information (TR. 92, 98) and conveyed no authority from the Railroad to operate.

The Appellants concede that Morrison-Kiewit-Birch are independent contractors in this instance. Certainly, the evidence supports this view (TR. 432, 433, 434, 435) (STR. 2, 3, 17-19) (Defendant's Exhibit BB). But the Appellants attempt to persuade the Court that in one respect, out of the many phases of work in which Greene participated, he, in that one respect became the employee and servant of the Appellee. For this the Appellants rely upon the words "right of control". Since the question involves statutory construction of a federal law, the Federal Courts are not bound by local decisions but may apply their own standards. *U. S. v. Sharpe,* 189 Fed. (2d) 239 and cases cited on page 241 thereof. The Appellants for purposes of strengthening their case quote from *Matcovich v. Anglin,* 134 Fed. (2d) 834, but the facts of that case demonstrate that the facts of the instant case do not warrant the Court finding that the

Appellee had any "control" as such over Harold D. Greene. The Appellants rely upon *Denton v. Yazoo and M. V. R. Company,* 284 U. S. 305, but again the facts of that case do not help the Appellants but, instead, show that the Railroad porter involved therein was actually engaged in performing the duties of the government, under governmental supervision, and hence was held properly to be an agent of the government. Further, the Appellants cite the case of *State of Maryland v. Manor Real Estate & Trust Co.,* 176 Fed. (2d) 414, but the only holding of this case was that the evidence showed the person in charge of the management of the property in question was not an independent contractor and therefore his employee was an agent of the government. Further, there was a statutory duty involved.

Appellants have cited the case of *Standard Oil Co. v. Parkinson,* 152 Fed. 681, but the quoted excerpt strengthens the Appellee's position since it is pointed out that in order to have the relationship of master and servant, the employer must have the right to direct and control the method and manner in which the work is done and *the result to be accomplished.* The following is taken from the case of *Standard Oil Co. v. Anderson,* 212 U. S. 215, where, on pages 220 and 221 the Court said:

> "It will aid somewhat in the ascertainment of the true test for determining this question to consider the reason and extent of the rule of a master's responsibility. The reason for the rule is not clarified much by the Latin phrases in which it is sometimes clothed. They are rather

restatements than explanations of the rule. The accepted reason for it is that given by Chief Justice Shaw in the case of *Farwell v. Boston & Worcester Railroad Corporation,* 4 Metcalf, 49. In substance, it is that the master is answerable for the wrongs of his servant, not because he has authorized them nor because the servant in his negligent conduct represents the master, but because he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured. It is said in that case that this is a 'great principle of social duty,' adopted 'from general considerations of policy and security.' But whether the reasons of the rule be grounded in considerations of policy or rested upon historical tradition, there is a clear limitation to its extent. *Guy v. Donald,* 203 U. S. 399, 406. The master's responsibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it.''

The Appellants insist that the ''qualification'' of Greene as a rail motor car operator worked some magic. Actually, Plaintiffs' Exhibit 5 shows on its face, in so many words that Greene passed the Rules Examination and was qualified as a rail motor car operator for Morrison-Knudsen Co., Inc. There is not a word to the effect that he was an operator for the Alaska Railroad. Attention is called to the case of *Salmon v. Kansas City,* 241 Mo. 14, 145 SW 16, 39 LRA (NS) 328. In this case the plaintiff attempted to persuade the Court that an independent contractor for the construction of sewers in Kansas City was not

an independent contractor as to one phase of the operation, that is, blasting. The plaintiff, who was an employee of the independent contractor and was injured when an unexploded shot went off near where he was working, attempted to recover against the City for his injuries. The contention that the relationship of principal and agent subsisted between the City and the contractor as to the blasting operation, was based on the pertinent fact that the City reserved and assumed control over the blasting. The contract did reserve to the City's engineer large powers of supervision and control, not only as to materials but as to the method and mode of construction. However, the Court pointed out on page 335 of the report of the cases in 39 LRA (NS), as follows:

> "Obviously, however, these powers are reserved to protect the interests of the city, and not in the interest of the contractor or his servants, nor for their protection. Neither the contractor nor his servants would have ground for complaint should the city fail to exercise such power of supervision. The engineer assumed no duty to plaintiff by the terms of the contract."

The Court refused to hold that the independent contractor could be converted into an agent of the City as to blasting operations by such provisions as mentioned above.

The Appellants also make a point of the fact that following the collision, Alaska Railroad officials informed the contractor that Greene was no longer qualified to operate a gas car on its tracks. The Appellants contend that this converts Greene into an agent of the

Appellee. There is ample law on this point to the effect that control of the employment and discharge of workmen by the contractee does not in itself convert the contractor from an independent contractor into an agent or employee of the contractee. See annotation in 20 ALR 684, at page 769, and the many cases cited in note 1. The above mentioned case of *Salmon v. Kansas City* is also authority to the effect that the right to require the discharge of an incompetent workman is a privilege retained by the contractee for its own protection (see page 335 of the reported case in 39 LRA (NS)). The following is taken from the Washington case of *Engler v. Seattle,* 40 Wash. 72, where, on page 80, the Supreme Court of the State of Washington stated:

> "On the other hand, conceding to him the right to discharge employees of Ryan & Company, still they were independent contractors. *Rogers v. Florence R. Co.,* supra; *Hobbit v. London, etc. R. Co.,* 4 Exch. 253; *Cuff v. Newark, etc. R. Co.,* 35 N. J. L. 17, 10 Am. Rep. 205. In *Hobbit v. London etc. R. Co.,* the court says:
>
> " 'Our attention was directed during the argument to the provisions of the contract, whereby the defendants (the Railway Company) had the power of insisting on the removal of careless or incompetent workmen, and so it was contended they must be responsible for their non-removal. But this power of removal does not seem to us to vary the case. The workman is still the servant of the contractor only, and the fact that the defendants might have insisted on his removal if they thought him careless or unskillful, did not make him their servant.' "

VI.

CONCLUSION.

The appellants have failed to sustain the burden of proof as required by law, (*Watt v. U. S.,* D.C.E.D. Ark. 123 Fed. Supp. 906, 911), that Harold D. Greene, was, at the time of the accident which gave rise to this action, an employee of the United States within the meaning of the controlling statute, 28 USCA Sec. 1346(b). They have tried to avoid this burden by indirection and fallacy. To be specific they cite cases to show the railroad is liable for the torts of a lessee but fail to establish the existence of a lease (for the reason there is none); they refer to liabilities of the railroad on the theory of its being a dangerous instrumentality without the citation of authority in point; they suggest that the railroad is "strictly liable" without proof of fault when the law is settled to the contrary under the provisions of Title 28, Section 1346(b) (*Dalehite v. U. S.,* 346 U. S. 15, 73 Supreme Court 956); they repeatedly allege that "control" of an individual is determinant of the master-servant relationship while ignoring an equally important factor of whose business the servant was about at the time in question.

In lieu of sustaining the burden of proof as required by law, appellants have made a brazen attempt to create the impression (by emphasizing a so-called indemnity clause, Appellants' Brief, page 26) that the defendant United States of America if held liable by this Honorable Court, will be reimbursed by a third party.

The Alaska Railroad has not been shown to be the employer of Harold D. Greene. The Alaska Railroad

lawfully contracted with certain independent contractors for whom Greene was working at the time of the accident. The right to control the result of such work performed (in this case the subject matter of contractors' contract) is not sufficient to make the independent contractor an "employee" of the government. *Hopson v. U. S.,* DC Ark. 1956, 135 Fed. Supp. 804. Even where the government retains the right of inspection to insure proper results, such does not amount to control as to the manner and method. *Strangi v. United States,* 211 Fed. Supp. 305, 307; *Harger v. Harger,* 144 Ark. 375, 222 S. W. 736.

The facts are apparent and the law is clear. The Federal Tort Claims Act requires a negligent act or omission of a Federal employee. This law is in derogation of sovereign immunity and should be strictly construed against the appellants. *Dalehite v. United States,* 346 U. S. 15; 73 S. Ct. 956, 97 L. Ed. 1427 and cases cited in footnote 22, page 30 of 346 U.S.). The appellants' theories should be examined in the light of applicable facts and ruling law, and when so examined the appellee respectfully submits that the Court below was correct and its decision should be affirmed.

Dated, Anchorage, Alaska,
January 16, 1957.

Respectfully submitted,
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